IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 28785 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KESHAVLAL SOMNATH JOSHI - Petitioner(s)

Versus

MANUBHAI SOMNATH JOSHI & 2 - Respondent(s)

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Appearance :

MR DIPAK R DAVE for Petitioner(s) : 1,

MR MAHENDRA K PATEL for Respondent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 14/11/2007

ORAL JUDGMENT

1. By way of this petition under Article 227 of the Constitution of India, the petitioner, - original plaintiff has prayed for an appropriate order to quash and set aside the order dated 30-10-07 passed by the learned Presiding officer, Fast Track Court No.1, Mehsana passed in Civil Misc. Appeal No.157/07, by which the learned Appellate Court has allowed the said appeal by quashing and setting aside the order passed by the learned Civil Judge (SD), Mehsana below Exh-5 and 15 dated 9-10-07.

2. It is the case of the petitioner that the petitioner is the real brother of the respondent No.1 and the respondent Nos.2 and 3 are the nephew of the petitioner. That the forefathers of the petitioner were owning the land situated at Survey No.727 at village Mevu, Tal & Dist: Mehsana admeasuring 1 hector, 56 are and 82 sq mtr. That because of the family arrangement, the said land was devided between the petitioner and the respondent No.1 and out of which, the land situated at southern side was given to the petitioner and he is in possession of the said land and the land on the northern side is in possession of the respondent No.1. That respondent Nos.2 and 3 being the son of the respondent No.1 are also cultivating the said land which was gone in the share of the respondent No.1. One understanding by way of agreement was arrived at between the petitioner and

the respondent No.1 on 19-9-2004, whereby it was specifically mentioned that there is a road of the width of 10 ft, which shall be used by the petitioner. It is the case of the petitioner that on 28-9-07, when the petitioner went to his suit property, the respondents asked the petitioner that petitioner shall give the land to them and when the petitioner declined to sell the land, the respondents got annoyed and they told the petitioner not to pass through the way and they decided to put obstructions on the way. It is the case of the petitioner that the said way is the only way available to the petitioner to get assess to the field of the petitioner and as the petitioner was restrained from using the said way, the petitioner immediately filed suit on 29-9-07 being civil suit No.225/07 in the Court of learned Civil Judge (SD), Mehsana. In the said suit, the petitioner also filed application below Exh-5 restraining the petitioner from using the said way and the learned trial Court issued the notice below Exh-5 making it returnable on 3-10-07. However, in the meantime, the defendants constructed the wall on the road and therefore, the petitioner submitted another application below Exh-15 for mandatory relief of removing the wall constructed on the road. The learned trial Court also appointed the Court Commissioner to prepare the panchnama and the Court Commissioner after visiting the place prepared the panchnama on 30-9-07. The learned trial Court after giving an opportunity to the plaintiff as well as

the defendants and after considering the fact that there was already an agreement between the parties dated 19-9-2004 and the wall has been constructed recently and there is no other way available to the petitioner to go to his field, the learned trial Court by order dated 9-10-2007 passed below Exh-5 and 15, allowed both the applications directing the defendants to keep open the road which was as per the agreement mark 4/3 and colour photograph, mark 11/2 and further directed the defendants to remove the wall constructed on the road till the final disposal of the suit. Being aggrieved by the aforesaid order passed below Exh-5 and 15 dated 9-10-07, the respondents herein, - original defendants preferred Civil Misc. Appeal No.157/07 and the learned Presiding Officer and Addl. District Judge, 1st Fast Track Court, Mehsana by his judgment and order dated 30-10-07 allowed the said appeal and quashed and set aside the order passed by the learned trial Court below Exh-5 dated 9-10-2007. Being aggrieved by the aforesaid judgment and order, the petitioner, - original plaintiff has preferred the present petition under Article 227 of the Constitution of India.

3. With the consent of learned advocates appearing for the respective parties, the matter is taken up for final hearing as per the order dated 13-11-2007.
4. Shri Dipak Dave, learned advocate appearing on behalf of petitioner has vehemently submitted that the learned Appellate Court has materially erred in

allowing the appeal and quashing and setting aside the order passed by the learned trial Court passed below Exh-5 and 15 solely on the ground that the learned trial Court could not have granted the interim relief which is main relief in the suit. He has also further submitted that in view of the fact that there was an agreement between the petitioner and the defendants dated 19-9-2004 which specifically mentioned that there was a road of width of 10 ft which shall be used by the petitioner, the learned trial Court has rightly granted the relief below Exh-5 and 15, which was not required to be interfered with by the learned trial Court. It is submitted that except the road in question, there is no road available to the petitioner for assessing to his field and therefore, the learned trial Court was justified in granting the relief directing the defendants to keep open the road by removing the wall constructed on the road recently. He has relied upon the decision of the Hon'ble Supreme Court in the case of Deoraj V. State of Maharashtra reported in (2004) 4 SCC 697 in support of his submission that in an appropriate case, the Court may grant the relief which would be the main relief in the suit. He has also relied upon the decision of the learned single Judge of this Court in the case of Chairman/secretary Bhadreshwar Co. Operative Hosg. Soc. V. Maharaj Samosa Centre Prop. Babulal Hariram reported in 2006(1) GLR 98 in support of his prayer to allow the petition.

5. On the other hand, Shri Mahendra K. Patel, learned advocate appearing on behalf of respondents, - original defendants has submitted that the only intention of the petitioner is to remove the temple and so far as the agreement dated 19-9-2004 is concerned, the same was not signed by the defendant No.2. He has also further submitted that as such, the petitioner has another way available and the road in question was used by the plaintiffs and others only for the purpose of going to the temple and was not meant for tractors, bullock cart etc. It is submitted that in fact, the learned Appellate Court has rightly held that in the facts and circumstances of the case, such a mandatory relief could not have been granted by the learned trial Court and therefore, it is requested to dismiss the present petition.
6. Heard the learned advocates appearing on behalf of parties.
7. It is required to be noted that the petitioner and the respondent No.1 are the real brothers and forefathers of the petitioner were the owners of the land bearing survey No.727 and due to family arrangement, the said land was divided between the petitioner and the respondent No.1 and the land situated at southern side has been gone to the share of the petitioner and he is in possession of the said land and the land on the northern side has gone to the share of the respondent No.1 and the respondent No.1 and his two sons i.e. the respondent Nos.2 and 3 are

cultivating the said land. That an agreement has been arrived at between the petitioner and the respondent No.1 signed by the respondent Nos.1 and 3 and the petitioner dated 19-9-2004, whereby it is specifically mentioned that there is a road of width of 10 ft which shall be used by the petitioner. The execution of the said agreement has not been denied by the defendants in the written statement and in fact, they have admitted that such an agreement is there, however, it is their case that the said agreement was entered into by compulsion. Thus, the existence and the execution has not been disputed by the defendants. From the panchnama, it appears that the Court Commissioner has specifically mentioned that the wall on the road has been recently constructed. The existence of the way has also not been denied by the defendants. However, it is their case that it is to be used by pedestrians going to the temple and it is not meant for tractors etc. As stated above, the suit came to be filed on 29-9-07 and the panchnama has been prepared by the Court Commissioner by visiting the place on 30-9-07 and it has been found by the Court Commissioner that the wall has been constructed on the road recently between 29-9-07 and 30-9-07 and considering the above aspect, more particularly, when it is found that the petitioner has no other way to get assess to his field and when the learned trial Court has allowed the application below Exh-5 and 15, it cannot be said that

there is any illegality committed by the learned trial Court. What is weighed with the learned Appellate Court and according to the learned Appellate Court, the relief which is main relief in the suit ought not to have been granted by way of interim relief. As held by the Hon'ble Supreme Court in the case of Deoraj (supra), in an appropriate case and looking to the situation, the Court may grant the interim relief which would tantamount to granting the final relief itself. This Court has also taken the similar view after following the decision of the Hon'ble Supreme Court in the case of Dorab Cawasji Warden V. Coomi Sorab Warden reported in (1990) 2 SCC 117 and it is held that in exceptional cases, Court has jurisdiction to grant interim mandatory orders also. Now considering the above and the decisions one of the Hon'ble Supreme Court and one of this Court, the learned Appellate Court was not justified in interfering with the order passed by the learned trial Court solely on the ground that the mandatory order which is granted would tantamount granting of main relief, ought not to have been granted. In the facts and circumstances of the case as narrated above and in view of the agreement dated 19-9-04 and the fact that the wall has been constructed recently after institution of the suit and that prima facie, it appears that there was a right of way and it is the case of the petitioner that there is no other right of way for assess to his field, the learned Appellate Court has

materially erred in interfering with the order passed by the learned trial Court allowing the application below Exh-5 and 15 by setting aside the order. Under the circumstances, the impugned judgment and order passed by the learned Appellate Court deserves to be quashed and set aside and the order passed by the learned trial Court below Exh-5 and 15 requires to be restored.

8. For the reasons stated above, the petition succeeds. The impugned judgment and order dated 30-10-07 passed by the learned Presiding officer, Fast Track Court No.1, Mehsana passed in Civil Misc. Appeal No.157/07 is hereby quashed and set aside and the order passed by the learned Civil Judge (SD), Mehsana below Exh-5 and 15 dated 9-10-07 is hereby restored. However, it is observed and clarified that the observations made by this Court in the present order is required to be confined to only considering the interim application and the learned trial Court to take its own decision at the time of deciding the suit on appreciation of the evidence without in any way being influenced by the observations made by this Court in the present order. It is also clarified and as agreed by the learned advocate appearing on behalf of the petitioner that if ultimately, the petitioner, - original plaintiff losses in the suit, he will construct the wall at his cost. It is also agreed by the learned advocate appearing on behalf of petitioner, - original plaintiff that original plaintiff does not intend to and

shall not disturb the existing temple and the structure. It will be open for the parties to move an appropriate application before the learned trial Court for early disposal of the suit and as and when such an application is made, the same shall be considered by the learned trial Court in accordance with law. Rule is made absolute. No costs.

(M.R. SHAH, J.)

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